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facts that would put a man of ordinary prudence on guard. However, a minority of jurisdictions hold that the occupant is not in good faith if he has constructive notice, such as that under the recording acts. As a general rule, therefore, the test of good faith would be the honest belief of a reasonable man.

WILLIAM L. ZIEGLER

The Use of Interrogatories in Ohio

Section 2309.43 of the Ohio Revised Code offers a method of discovery which is both simple and inexpensive. Under this section:

A party may annex to his pleading, other than a demurrer, interrogatories pertinent to the issue made in the pleadings, which interrogatories, if not demurred to, shall be plainly and fully answered under oath by the party to whom propounded, or if such party is a corporation, by the president, secretary, or other officer thereof, as the party propounding requires.

Although this statute has been in effect in substantially the same form since 1857, it has been ignored by most lawyers in favor of the deposition. One of the prime reasons for this is the lack of clarity in the law as to the use of this statute. Although it is true that the limitations imposed upon interrogatories cannot be easily altered without legislative enactment, a clarification of the law regarding them may lead to their more liberal use, thereby saving attorneys both time and expense.

Interrogatories attached to pleadings are by their very nature limited in that they may be addressed only to parties and by the fact that interrogated parties may perhaps evade the truth since they are given time to consider their answers. On the other hand, they have advantages beyond their simplicity and inexpensiveness. For example, they may be addressed to a corporation and the corporation must answer them through its officers,¹ thereby saving the lawyer the inconvenience of taking the depositions of the corporation's officers individually. They may also be used to great advantage to obtain stipulations and other basic facts which are necessary even to present a case, yet require great expense to prove. When a party has only a few questions it would seem foolish to go to the expense of taking a deposition.

FORM

As pointed out above, interrogatories of this kind may only be addressed to a party. They must be answered by the party addressed and verified by him, not by his attorney.² The answers to the interrogatories must be put

¹ Carter v. Enquirer Co., 10 Ohio Dec. 119, 8 Ohio N.P. (N.S.) 319 (1900)

² Wentzel v. Zinn, 10 Ohio Dec. 97, 7 Ohio N.P. (N.S.) 512 (1900).

on a separate paper from the interrogated party's pleading and may not be commingled in the answer or reply.³ An other result would make the pleadings ponderous, and there would be the danger of pleading evidence. Unless the interrogatories concern an issue raised in the answer, the plaintiff must attach them to the petition by amendment after the defendant has answered, not in the reply.⁴ However, the issues need not be joined before the plaintiff may pose his interrogatories, nor is a plaintiff precluded from asking defendant something which is alleged to be true in the petition.⁵ A defendant may attach to his answer interrogatories pertinent to issues raised by his answer including matters in mitigation.⁶ Where a defendant does not present a defense or raise an affirmative issue, he may not use interrogatories to get facts so that he may plead, for there would be no issues to which the interrogatories would pertain.⁷

SCOPE

Because a court's ruling as to the validity of an interrogatory is not a final order and is not appealable unless there is an abuse of the trial court's discretion,⁸ nearly all the law pertaining to interrogatories is found in nisi prius decisions. As might be expected, great confusion exists as to the scope of the questions that may be asked in interrogatories. Much of the confusion is attributable to a dictum in an early Ohio Supreme Court decision wherein it was stated that the scope of discovery in Ohio is limited to the rules of the old bill of discovery in equity.⁹ According to this opinion both interrogatories and depositions were so limited. If this dictum were correct an interrogator or a party taking a deposition would not be allowed to ask questions which would tend to reveal the evidence of his adversary.¹⁰ This doctrine was originally rooted in the theory that the advantages of discovering the evidence of one's opponent was outweighed by the danger that lawsuits would become less an adversary type of proceeding.

The early statement of the Ohio Supreme Court that the old bill of discovery rules apply to Ohio's statutory discovery methods is unquestionably wrong today with regard to depositions, for it is well settled in Ohio that a defendant cannot refuse to answer a deposition simply because it solicits

³ *Wild v. Cadwalader*, 18 Ohio Dec. 565, 5 Ohio L. Rep. 477 (1907).

⁴ *Templeton v. Morgan*, 2 Ohio Dec. Repr. 602, 4 West. L. Mo. [Ohio] 146 (1862).

⁵ *Mecum v. Beshore*, 119 N.E.2d 676 (Fayette Com. Pl. 1954).

⁶ *Giant v. Times Star*, 9 Ohio Dec. 619 (1899).

⁷ *Dye v. Buchwalter*, 19 Ohio Dec. 791 (1909).

⁸ *Collins v. Cab Co.*, 157 Ohio St. 311, 105 N.E.2d 395 (1952).

⁹ *Chapman v. Lee*, 45 Ohio St. 356, 366, 13 N.E. 736, 740 (1887).

¹⁰ WIGMORE, EVIDENCE § 1846.

his testimony.¹¹ The only limitations on depositions addressed to parties are privilege, self-incrimination, and apparent irrelevancy.¹² Although numerous Ohio decisions have limited interrogatories to questions necessary for the interrogator to establish his own case, there is no apparent reason why depositions and interrogatories should be distinguished as to the scope of the information that may be sought.¹³ As early as 1904 an Ohio court found no objection to an interrogatory merely because it required the defendant to reveal information detrimental to his own case and decided that a "fishing expedition" was not necessarily objectionable.¹⁴ Most Ohio cases taking this view, however, did not appear on the scene until after 1938 when the Federal Rules of Discovery were adopted. Under these rules the Supreme Court of the United States announced a new liberal philosophy of discovery which is accepted in general by the legal profession today.¹⁵ In discussing the use of interrogatories in federal procedure the court said,

No longer can the time honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation and to that end either party may compel the other party to disgorge whatever facts he has in his possession.¹⁶

The Supreme Court of Ohio has never openly repudiated its earlier dictum relating to the limitations of discovery methods, but it has definitely liberalized its views in at least one case. In *In re Keough* the court implicitly said that Section 11551 of the Ohio General Code,¹⁷ pertaining to the discovery of books and writings is only limited by privilege.¹⁸ In its opinion the court held that the plaintiff is entitled to discovery of papers and documents held by the defendant such as trip sheets, names of operators, and other records in control of defendant transportation company which were not privileged.¹⁹

¹¹ *In re Berger*, 13 Ohio App. 206 (1919), *Aff'd*, 101 Ohio St. 512, 130 N.E. 435 (1920).

¹² *In re Keough*, 151 Ohio St. 307, 85 N.E.2d 550 (1949); *In re Bott*, 146 Ohio St. 511, 66 N.E. 2d 918 (1946); *Davies v. Columbia Gas & Electric Co.*, 68 N.E.2d 571 (Franklin Com. Pl. 1938).

¹³ *Chapman v. Lee*, 45 Ohio St. 356, 13 N.E.2d 736 (1887); *Sterling v. Henley Motor Co.* 87 Ohio App. 362, 95 N.E.2d 273 (1950); *Leeper v. Nimer*, 94 N.E.2d 286 (Summit Com. Pl. 1950); *Ward v. Mutual Trucking Co.* 1 Ohio Supp. 42 (Huron Com. Pl. 1933); *Kleinmeyer v. Payne*, 16 Ohio Dec. 289 (1905). See also *Devore v. Dunmore & Clark*, 2 Ohio Dec. 600 (1862).

¹⁴ *Graham v. Ohio Telephone & Telegraph Co.*, 2 Ohio N.P. (N.S.) 612 (1904), which cites *Templeton v. Morgan*, 2 Ohio Dec. Repr. 607, 4 West. L.Mo. [Ohio] 146 (1882) (interrogatories not limited to chancery rules.)

¹⁵ *Hickman v. Taylor*, 329 U.S. 495, 67 Sup. Ct. 385 (1947).

¹⁶ *Id.* at 507, 67 Sup. Ct. at 392.

¹⁷ OHIO REV. CODE § 2317.32.

¹⁸ *In re Keough*, 151 Ohio St. 307, 85 N.E.2d 550 (1947).

¹⁹ It is most significant that Ohio Revised Code Section 2317.32 is different from

Under the more liberal view, taken by the Ohio courts in recent decisions, it has been held, contrary to earlier authority, that interrogatories may be asked by the defendant which relate solely to the evidence which plaintiff would present to prove his damages.²⁰ Similarly, a demurrer to interrogatories was overruled which solicited the names of persons on the stairs of defendant's establishment when plaintiff fell on the stairs, and the fact that such involved the case of the adverse party is no objection.²¹ Questions relating to the number of men in the crew assigned to the train which caused plaintiff's injury, their names and jobs, what the purpose of the train's maneuvers was at the time of the accident, and other questions which were submitted to get information through which plaintiff hoped to discover evidence for himself or against his opponent have been allowed.²²

Although the Ohio Courts have adopted this liberal philosophy, there are still certain limitations on the types of questions that may be asked in interrogatories. For example, the cases holding that opinions and hearsay may not be solicited have never been refuted.²³ There is no reason for such a limitation since answers of this type would not be admissible in evidence,²⁴ but the early decisions seemed to go on the assumption that all answers to interrogatories were admissible.²⁵ Another limitation is that questions may not be asked which are not within the personal knowledge of the defendant and especially when the facts are more likely to be in the knowledge of the interrogator.²⁶ Of course, this rule covers hearsay and opinion evidence, but it does seem fair because it prevents the vexatious and frivolous type of interrogating too often indulged in by attorneys.

The one qualification of the statute is that the questions be pertinent to the issues, and this rule is rigidly enforced. In defining the word "per-

Ohio General Code Section 1551, its predecessor, in that the former has omitted the phrase "in cases and under circumstances where they might heretofore have been compelled to produce them by ordinary rules of chancery." The obvious intent of the legislature was to liberalize this statute. Ohio Revised Code Section 2309.43, the statute here under discussion, has never included this phrase.

²⁰ *Sloan v. S.S. Kresge Co.*, 97 N.E. 238 (Trumbull Com. Pl. 1951). But see an earlier case involving the same kind of interrogatory. *Ward v. Mutual Packing Co.* 1 Ohio Supp. 42 (Huron Com. Pl. 1933).

²¹ *Furman v. Central Park Plaza Corp.* 102 N.E.2d 622 (Cuyahoga Com. Pl. 1951).

²² *Dieckbrader v. N.Y. Central R.R.*, 113 N.E. 268 (Hamilton Com. Pl. 1953). See also *Powers v. Ruelback*, 108 N.E.2d 876 (Cuyahoga Com. Pl. 1952).

²³ *Leeper v. Nimer*, 94 N.E.2d 286 (Summit Com. Pl. 1950); *Russell v. Lake Shore & M.S. Ry.*, 17 Ohio Dec. 435 (1907).

²⁴ *Schuldt v. Associates Investment Co.*, 61 Ohio App. 213, 22 N.E.2d 272 (1938).

²⁵ *Russell v. Lake Shore & M.S. Ry.*, 17 Ohio Dec. 435 (1907).

²⁶ *Smith v. Cory Rubber Co.*, 69 N.E.2d 777 (Marion Com. Pl. 1945); *International Art Publishing v. Griesbaum*, 28 Ohio N.P. (N.S.) 349 (1931).

tinient" the courts have held simply that the word means in law as well as in human affairs "belonging or related to the subject matter at hand."²⁷ An early case held that a defendant agent could not be made to disclose his principal by interrogatories since full recovery in the suit could be had against the agent and that since the principal was not joinable as a defendant the question was not pertinent to the issues raised in the plaintiff's case.²⁸ Of course, interrogatories could be used to discover joinable parties.²⁹

Interrogatories used for purposes of delay or which are vexatious in nature are undoubtedly demurrable, although no case in point can be found since a court may in its sound discretion disallow any interrogatory.³⁰ There seems to be no limit to the number of questions that may be asked, but it would seem that too great a number should not be allowed for they would burden the court greatly and tend to defeat the purpose of interrogatories which is to promote simplicity.³¹ If there is a necessity for a great number of questions, a deposition should be used.

ADMISSION IN EVIDENCE

The Ohio statute allows the admission of the interrogatories and their answers into evidence by either party.³² Of course, the answers must be competent. Conclusions and self-serving declarations may not be put in evidence this way.³³ However, as indicated above it is questionable whether such answers may even be solicited.

ENFORCEMENT

If the defendant refuses to answer interrogatories the plaintiff may be allowed a default judgment, or if the plaintiff refuses to answer, defendant may have the suit dismissed.³⁴ The trial judge, however, may enforce the answering of interrogatories in his discretion, and an order to answer interrogatories or take a default judgment is not self-executing or a final order.³⁵

The proper method of objecting to interrogatories is by demurrer³⁶

²⁷ *Sloan v. S.S. Kresge Co.*, 97 N.E.2d 23 (Trumbull Com. Pl. 1951).

²⁸ *Stanley v. Martin*, 19 Ohio Dec. 864 (1909).

²⁹ *Graham v. Telephone Co.*, 2 Ohio N.P. (N.S.) 612 (1904).

³⁰ *Collins v. Cab Co.*, 157 Ohio St. 311, 105 N.E.2d 395 (1952).

³¹ *Mecum v. Beshore*, 119 N.E.2d 676 (Fayette Com. Pl. 1954).

³² OHIO REV. CODE § 2309.45.

³³ *Leeper v. Nimer*, 94 N.E.2d 286 (Summit Com. Pl. 1950); *Russell v. Lake Shore & M.S. Ry.*, 17 Ohio Dec. 435 (1907).

³⁴ OHIO REV. CODE § 2309.45.

³⁵ *Railway Co. v. Construction Co.*, 49 Ohio St. 681, 33 N.E. 961 (1892).

³⁶ *Dye v. Buchwalter*, 19 Ohio Dec. 791 (1909).

although some courts have allowed a motion to strike to be used.³⁷ Where a defendant takes exception and answers, he then loses his right to demur by waiver.

CONCLUSION

The early decisions in Ohio unduly limited the use of interrogatories attached to pleadings on an historical basis. The doctrine on which these historical limitations are founded has largely been repudiated, but attorneys continue to ignore this simple method of discovery and favor the deposition. In the light of recent decisions, there is no longer any good reason for attorneys to go to such expense, for in innumerable cases the interrogatory could serve their purpose adequately.

FRANK H. HARVEY, JR.

³⁷ Thomas v. Beebe, 8 Ohio Dec. 231 (1897).